Supreme Court, U.S.
FILED
99 948 DEC 31 1999
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CLAUDE CIMINO, ET AL.,

Petitioners,

v.

PITTSBURGH CORNING CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Of Counsel:

WAYNE A. REAUD
JOHN WERNER
REAUD, MORGAN & QUINN, INC.
801 Laurel
Beaumont, Texas 77701
(409) 838-1000

JONATHAN S. MASSEY
3920 Northampton St. N.W.
Washington, D.C. 20015
(202) 686-0457

GREG M. THOMPSON
Counsel of Record
JOHN A. COWAN
PROVOST & UMPHREY
LAW FIRM, L.L.P.
490 Park Street
Beaumont, Texas 77701
(409) 835-6000
(409) 838-8883 (fax)

Counsel for Petitioners

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

55pp

QUESTION PRESENTED

Whether the Judicial Panel on Multidistrict Litigation may direct the transfer of cases pending in a federal district court even when:

- those actions are already in trial;
- the common questions of fact and law have already been resolved in a prior phase of the proceeding; and
- any remaining discovery or other pretrial matters involve individualized questions of fact that plainly should not be conducted in the multidistrict context.

PARTIES TO THE PROCEEDING

The plaintiff in the district court (petitioner in the court of appeals) was Claude Cimino, on behalf of group of 2,280 similarly situated plaintiffs in the Eastern District of Texas.

The defendant below (respondent in the court of appeals) was the Pittsburgh Corning Corporation.

TABLE OF CONTENTS

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iiv

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 14

A. The Third Circuit's Decision Conflicts with Numerous Other Decisions in the Lower Courts. 16

B. The Third Circuit Created a Direct Jurisdictional Conflict With the Eastern District of Texas 26

C. The Third Circuit Approved the Use of Impermissible Factors as Reasons for Transfer 27

Conclusion 29

Appendix A--Opinion of the Court of Appeals 1a

Appendix B--Transfer Order of the Judicial Panel on Multidistrict Litigation 9a

Appendix C--Case Management Order of the Eastern District Court of Texas 12a

Appendix D--Order Denying Petition for Rehearing 16a

TABLE OF AUTHORITIES

Cases

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).. 19, 28

Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998). ..... passim

Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990)..... 7, 18

Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997). 14, 19, 28

In re A. H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig., 505 F. Supp. 221 (J.P.M.L. 1981) 22

In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Prod. Liab. Litig., 570 F. Supp. 1480 (J.P.M.L. 1983). 22

In re Air Crash Disaster Near Silver Plume, 368 F. Supp. 810 (J.P.M.L. 1973)..... 21

In re Allen Compound Bow Patent Litigation, 446 F. Supp. 248 (J.P.M.L. 1978). 24

In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig., 431 F. Supp. 906 (J.P.M.L. 1977) 18, 25

In re Asbestos Prod. Liab. Litig., 771 F. Supp. 415 (J.P.M.L. 1991)..... 16, 18

In re Asbestos School Prods. Liab. Litig., 606 F. Supp. 713 (J.P.M.L. 1985). 20, 22

In re Cable Tie Patent Litigation, 487 F. Supp. 1351 (J.P.M.L. 1980)..... 23

In re Chiropractic Antitrust Litigation, 483 F. Supp. 811 (J.P.M.L. 1980). 23

In re Deering Milliken Patent Litigation, 476 F. Supp. 461 (J.P.M.L. 1979) 20

In re Dow Chem. Co. "Sarabond" Prods. Liability Litigation, 650 F. Supp. 187 (J.P.M.L. 1986) 22

In re Ecuadorian Oil Concession Litigation, 487 F. Supp. 1364 (J.P.M.L. 1980) 23

In re Fibreboard, 893 F.2d 706 (5th Cir. 1990). 5, 9

In re Four Seasons Sec. Laws Litig., 362 F. Supp. 574 (J.P.M.L. 1973) 26

In re Grand Funk Railroad Trademark Litig., 371 F. Supp. 1084 (J.P.M.L. 1974) 21

In re Helicopter Crash Near Cameron, Louisiana, on April 23, 1976, 443 F. Supp. 1022 (J.P.M.L. 1978). 25

In re Insulin Mfg. Antitrust Litigation, 487 F. Supp. 1359 (J.P.M.L. 1980) 23

In re Luminex Int'l Prods. Liab. Litig., 434 F. Supp. 668 (J.P.M.L. 1977). 25

In re McDonald's Franchise Antitrust Litigation, 472 F. Supp. 111 (J.P.M.L. 1979). 24

In re Midwest Milk Monopolization Litigation, 441 F. Supp. 930 (J.P.M.L. 1977). 25

In re Midwest Milk Monopolization Litigation, 483 F. Supp. 823 (J.P.M.L. 1980) 23

In re Motion Picture Licensing Antitrust Litig., 479 F. Supp. 581 (J.P.M.L. 1979). 24

In re Ortho Pharmaceutical "Lippes Loop" Prods. Liability Litigation, 447 F. Supp. 1073 (J.P.M.L. 1978). 24

In re Raymond Lee Organization, Inc., Secs. Litigation, 446 F. Supp. 1266 (J.P.M.L. 1978). 24

In re Rely Tampon Prod. Liab. Litig., 533 F. Supp. 1346 (J.P.M.L. 1982). 22

In re Southern Ry. Employment Practices Litigation, 441 F. Supp. 926 (J.P.M.L. 1977). 25

In re United Gas Pipe Line Co. Litig., 391 F. Supp. 774 (J.P.M.L. 1975). 21

In re Westinghouse Elec. Corp. Employment Discrimination Litigation, 438 F. Supp. 937 (J.P.M.L. 1977). 25

In re Women's Clothing Antitrust Litigation, 455 F. Supp. 1388 (J.P.M.L. 1978). 24

Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986). 9, 10, 11

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 118 S. Ct. 956 (1998). 2, 3, 16

Statutes

28 U.S.C. § 1254 1

28 U.S.C. § 1332 1

28 U.S.C. § 1367 1

28 U.S.C. § 1407 ..... passim

28 U.S.C. § 1651 1

Other Authorities

American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* § 3.01 (1994) 21

H.R. Rep. No.1130, 90th Cong., 2d Sess., p. 4 (1968). 16

Rules

Fed. R. Civ. P. 23 ..... 4, 7, 28

Fed. R. Civ. P. 42 4

R. Jud. Panel. Multidistrict Litig. 14..... 16

Treatises

15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3862 (2d ed. 1986 and 1998 Supp.)..... 15

15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3863 (2d ed. 1986 and 1998 Supp.).
..... 20, 21

17 MOORE'S FEDERAL PRACTICE § 112.05 (3d ed. 1997).
.....
..... 20, 21

PETITION FOR A WRIT OF CERTIORARI

Petitioners Claude Cimino, *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. 1a-8a) is unreported. The transfer order of the Judicial Panel on Multidistrict Litigation (App. 9a-11a) is unreported. The case management order of the Eastern District Court of Texas (App. 12a-15a) is unreported.

JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1367. The court of appeals had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1407(e), 1651(a). Petitioners' timely filed petition for rehearing and suggestion for rehearing en banc was denied on September 9, 1999. App. 16a-17a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1407(a) provides:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation

> authorized by this section upon its determination that transfers for such proceedings will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

STATEMENT OF THE CASE

This case follows up on the issue decided by this Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998). This case presents the question of whether the Judicial Panel on Multidistrict Litigation may direct the transfer of cases pending in one federal district court to a different federal district court even when:

- those actions are already in trial;
- the common questions of fact and law have already been resolved in a prior phase of the proceeding; and
- any remaining discovery or other pretrial matters involve individualized questions of fact that should not be conducted in the multidistrict context.

This question raises a fundamental issue of federal judicial power under the multidistrict litigation statute, 28 U.S.C. § 1407(a). If multidistrict transfers are permitted in circumstances as extreme as those in this case, there are no effective limits on the power of the Judicial Panel on Multidistrict Litigation to order the transfer of pending cases, even when they are already

in trial. The statutory limits imposed by Congress will be rendered nugatory.

Thus, in this case Chief Judge Becker indicated that he would have granted rehearing en banc on the ground that "the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court." App. 16a-17a n.2. He opined that "the only causation questions remaining [are] those relating to individual damages determinations." *Id.*

This Court should do in this case precisely what it did in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998): reject the abusive and ever-expanding use of the MDL process in which some lower courts have engaged and reaffirm the important statutory limits imposed by Congress.

This case is a particularly appropriate vehicle to reaffirm the fundamental limits on multidistrict transfers because the decision in this case conflicts with numerous other lower court decisions in the MDL context. Further, this proceeding is characterized by a remarkable conflict among decisions *in the very same case* by the Eastern District of Texas, the Fifth Circuit Court of Appeals, the Judicial Panel on Multidistrict Litigation, and the Third Circuit Court of Appeals. In essence, the Multidistrict Panel and the Third Circuit have pulled out the rug from underneath pending proceedings in the Eastern District of Texas, by purporting to reinterpret a decision of the Fifth Circuit Court of Appeals. The Third Circuit has precipitated an unseemly and unjustifiable jurisdictional tug of war.

This Court's plenary review is urgently needed.

Procedural Background

This case involves 2,280 products liability asbestos cases, which have languished in the federal courts for over a decade. The bulk of the cases were filed in the Eastern District of Texas

in 1987, and all cases were filed in that District prior to February 1, 1989. The Eastern District of Texas held a jury trial on the liability portion of the claims in 1990. The district court entered judgments in 1993. The Fifth Circuit heard oral argument on the defendant's appeal in 1995. It did not render its decision until 1998. More than 720 of the plaintiffs have died in the intervening years since trial.

The cases have now been transferred to the Eastern District of Pennsylvania as part of the multidistrict process. The remaining plaintiffs are entitled to a transfer of these cases back to the Eastern District of Texas for a prompt resolution of their claims, for the Texas district court was in the midst of implementing a trial plan, providing for mini-trials beginning in May 1999, at the time the transfer order was issued.

1. The Original Trial Plan.

On October 26, 1989, the U.S. District Court for the Eastern District of Texas entered an order consolidating 3,031 cases under Fed.R.Civ.P. 42(a) for a single trial on the issues of state of the art and punitive damages and certifying a class action under Rule 23(b)(3) for the remaining issues of exposure and actual damages. The consolidation and certification included all pending suits in the Beaumont Division of the Eastern District of Texas filed as of February 1, 1989, by insulation workers and construction workers, survivors of deceased workers, and household members of asbestos workers who were seeking money damages for asbestos-related injury, disease, or death.

Phase I was a single consolidated trial proceeding which decided the state of the art and punitive damages issues. The district court explained that:

> the jury will be asked to decide issues such as (a) which products, if any, were asbestos-containing insulation products capable of producing dust that contained asbestos fibers sufficient to cause harm in its application, use, or removal; (b) which of the Defendants' products, if

> any, were defective as marketed and unreasonably dangerous; (c) when each Defendant knew or should have known that insulators or construction workers and their household members were at risk of contracting an asbestos-related injury or disease from the application, use, or removal of asbestos-containing insulation products; and (d) whether each Defendant's marketing of a defective and unreasonably dangerous product constituted gross negligence. In answering issue (d), the Jury will hear evidence of punitive conduct including any conspiracy among the Defendants to conceal the dangers (if any) of asbestos.

Quoted in *In re Fibreboard*, 893 F.2d 706, 708 (5th Cir. 1990). By order of December 29, 1989, the district court provided that "the jury may be allowed to formulate a multiplier for each defendant for which the jury returns an affirmative finding on the issue of gross negligence."

Phase II of the original trial plan would have determined causation issues. In Phase III, damages were to be determined for some of the plaintiffs, and, in addition, damages figures were to be provided for extrapolation to other plaintiffs.

The defendants sought mandamus before the Fifth Circuit, attacking "the district court's efforts to try these cases in a common trial." *In re Fibreboard*, 893 F.2d at 707. The Fifth Circuit invalidated the proposed Phase II under due process, the Seventh Amendment, and the *Erie* doctrine, but expressly held that "[w]e find no impediment to the trial of Phase I should the district court wish to proceed with that trial." *Id.* at 712.

2. The Phase I Trial.

After the Fifth Circuit's decision, in 1990 the district court held an eight-week jury trial on the Phase I issues. The defendants then remaining were Carey Canada, Celotex, Fibreboard, and Pittsburgh Corning. The jury was asked to answer 17 separate questions. The first four questions asked

when the defendants knew or should have known that their "asbestos-containing insulation products" posed a risk of asbestos-related disease to "insulators," to their household members, to other "crafts working with or near insulation products," and to their household members. The jury found that Pittsburgh Corning knew or should have known this since 1962 (when it first entered the business) as to both insulators and other crafts; the other three defendants since 1935 as to insulators and since 1955 as to other crafts; all four defendants as to both sets of household members since 1965. In answer to question 5, the jury found that, since 1962 as to Pittsburgh Corning and since 1935 as to the other defendants, the defendants' listed insulation products "were defective and unreasonably dangerous as a result of not having an adequate warning." In question 7, the jury found each defendant guilty of gross negligence warranting punitive damages and assigned a punitive damages multiplier of $3.00 per $1.00 of actual damages to Pittsburgh Corning, $2.00 to Celotex, and $1.50 each to Fibreboard and Carey Canada. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 304 (5th Cir. 1998).[1]

Thus, the Phase I jury verdict established, with respect to all 2,280 plaintiffs whose cases are the subject of this proceeding, that:

· Pittsburgh Corning knew or should have known in 1962 that its asbestos-containing products posed a risk of asbestos-related disease, *and*

· Pittsburgh Corning's asbestos-containing products were defective and unreasonably dangerous, *and*

· Pittsburgh Corning's warnings were inadequate, *and*

· Pittsburgh Corning was grossly negligent, *and*

---

[1] Questions 8 through 17 separately addressed the individual cases of each of 10 class representatives. For these 10 plaintiffs, Phase I represented a complete jury trial of their entire individual cases.

· Pittsburgh Corning should pay as punitive damages 3 times the amount of actual damages awarded to each plaintiff.

In a series of rulings both before and after the Phase I trial, the district court made clear that the class-wide findings would be binding on the defendants with respect to all plaintiffs. *See* Order and Notice of Oct. 26, 1989; Order and Memorandum of Mar. 13, 1990; Order of Nov. 21, 1990; Order of Mar. 5, 1991. *See also Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990) (Phase I "resolve[d] all common issues," including "[t]he question of punitive damages *in the entire case* of the 2,298 class [members]") (emphasis added).

On February 19, 1990, the district court certified a class under Fed. R. Civ. P. 23(b)(3) consisting of 2,298 plaintiffs with pending cases in the Eastern District of Texas. The Order of certification was directed to Phase I. *See* 2/19/90 Memorandum and Order at 12; 751 F. Supp. at 653. Pursuant to Rule 23(c)(2), notice was provided to all plaintiffs in pending suits in the Beaumont Division in the Eastern District of Texas, filed as of February 1, 1989, by insulation workers and construction workers, craftsmen working with or near insulation products, survivors of deceased workers, and household members of workers exposed to asbestos.

On March 13, 1992, the district court entered a Final Consolidated and Class Action Judgment "to comply with the requirements of Rule 23(c)(3)." The district court explained that "Phase I involved not only the trial of the ten (10) class representatives' cases on all issues, but also the determination of the common issues of state of the art and punitive damages. The Phase I jury, along with establishing punitive damage multipliers, specifically decided whether each asbestos-containing insulation product manufactured by each defendant was defective and unreasonably dangerous, the adequacy of warnings, the state of the art defense, and the fiber type defense." The district court noted that orders had been entered with respect to all 2,298 plaintiffs.

3. The Phase II and Phase III Proceedings.

Following completion of the Phase I trial, the district court proceeded into a damages phase (Phase III) for 160 sample plaintiffs drawn from each of five different asbestos-related diseases. The court instructed the jury that it was to assume exposure was sufficient to be a producing cause of all the disease categories. *See Cimino*, 151 F.3d at 304-05.[2] The jury rendered 12 zero verdicts and 148 damages verdicts in the sample cases. The district court ordered remittiturs in 35 of these cases and calculated an average actual damages award for each asbestos disease category, after remittitur and considering the zero verdicts. The court intended to extrapolate these figures to the remaining 2,128 cases. *Id.* at 306.

Following a one-day bench hearing, the district court determined that in each disease category the 160 sample cases were reliably representative of the cases involving the like disease among the remaining 2,128 cases. The court ruled that each of these remaining 2,218 cases (the "extrapolation cases") would be assigned to one of the five disease categories, and each plaintiff would be entitled to judgment based on an amount of actual damages equal to the average of the verdicts rendered in those of the 160 sample cases involving the same disease category. Punitive damages were assessed on the basis of the Phase I verdict. *Id.* at 309.

---

[2] Phase II, the causation and exposure phase, had been dispensed with on the basis of a stipulation (reserving the defendants' Seventh Amendment and related objections) providing that "it shall be deemed that the Phase Two jury" assigned in all instances the following comparative causation shares, viz: Pittsburgh Corning, ten percent; Fibreboard, ten percent; Celotex, ten percent; and Manville Personal Injury Settlement Trust, thirteen percent. *Id.* at 307. This stipulation formed the basis for judgments entered on an extrapolation basis.

After the Fifth Circuit's 1998 decision, this stipulation became a nullity.

4. The Fifth Circuit's 1998 Decision.

On appeal, the Fifth Circuit held that the extrapolation process in Phase III of the trial violated the Seventh Amendment and Texas law insofar as it did not provide individualized determinations of exposure and damages. Accordingly, the court of appeals reversed the judgments in the 143 Phase III cases and in all five extrapolation cases before it, and remanded those cases for further proceedings to determine individual issues of exposure, causation, and (for those plaintiffs whose individual damages had not been tried in Phase III), damages. The Fifth Circuit expressly held, with respect to the 143 Phase III plaintiffs, that "[i]n these cases, the trial plan was adequately individualized and preserved Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease. . . . It was strictly a damages trial as to those individual plaintiffs." 151 F.3d at 315. The court of appeals thus indicated that, as to such plaintiffs, any further proceeding could be limited to the issue of exposure.

Moreover, the Fifth Circuit expressly reaffirmed the propriety of the Phase I class-wide verdicts. It remanded the class representatives' cases only for the limited purpose of the calculation of prejudgment interest. The court of appeals held that Phase I was not only "a complete jury trial of the entire individual cases of the ten class representatives," but "also *a class-wide determination* of issues of product defectiveness, warning, and punitive damages (including a multiplier as to each defendant)." *Cimino v. Raymark Indus., Inc.*, 151 F.3d at 299-300 (emphasis added). The Court of Appeals reaffirmed (*see id.* at 302 & n.10) that Phase I was nothing more than the *class-wide* adjudication of liability issues it had approved in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 471 (5th Cir. 1986) ("common questions" would be "resolved *for the class*") (emphasis added), and *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990), where the Fifth Circuit approved "a single trial" for all plaintiffs on liability issues. 893 F.2d at 708.

Hence, the Fifth Circuit affirmed the unanimous Phase I jury findings, declaring "we reject all of [Pittsburgh Corning's] contentions on appeal except that relating to the date on which prejudgment interest commences to accrue." 151 F.3d at 335. The court of appeals expressly rejected Pittsburgh Corning's objection to the punitive damage multiplier:

> The use of a multiplier to determine punitive damages is likewise challenged by Pittsburgh Corning. However, our decisions in *Jenkins* and *Fibreboard* mandate rejection of that challenge. It is also contended that the multiplier of three that the jury assigned to Pittsburgh Corning is excessive, both generally and as a matter of due process. We reject this contention.

Id. at 323.

5. The Texas District Court's Plan for Completing the Trials.

After the Fifth Circuit's 1998 decision, the U.S. District Court for the Eastern District of Texas entertained extensive briefing and argument on the meaning of the decision and the proper disposition of the remaining plaintiffs' claims. On December 2, 1998, the district court issued an initial case management order to outline its plan for completing the remaining trials.

The district court observed that, "[a]lthough the Court of Appeals disapproved of the extrapolation procedure which was used by this court, the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier." App. 12a. "[B]ecause the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages [i]n 143 cases. *The phase I or liability part of the trial of all of these cases has been completed.*" App. 13a (emphasis added).

The district court noted that "Pittsburgh Corning has

suggested to the Judicial Panel on Multidistrict Litigation that these cases should be consolidated with MDL 875 as tag-along cases." App. 13a-14a. "However, assuming these cases remain in this district for completion of the trials, this court is prepared to begin the process of trying these cases in groups using the procedures approved in *Jenkins v. Raymark Industries*, as soon as possible." App. 14a.

The district court made arrangements for the prompt completion of the trials in all of the remaining cases, focusing the on the use of mini-trials of four to ten plaintiffs — an approach that the Fifth Circuit had endorsed in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986); *see also Cimino*, 151 F.3d at 301 n.8. The district court ordered counsel for all parties to meet and confer in a good faith attempt to agree on a trial plan. App. 14a. The district court opined that "[t]he trial plan should include any additional discovery that may be warranted, such as updated medical records and expert reports and discovery into the circumstances of exposure. Discovery shall occur on a rolling basis and be focused on each group of plaintiffs as the dates for mini-trials approach." App. 14a.

The district court instructed that, "[a]t the conclusion of discovery for each mini-trial group of plaintiffs, those cases shall be referred to a qualified attorney mediator for mediation. Counsel are encouraged to agree upon the name of an attorney mediator. If counsel are unable to agree, the court will designate a mediator." App. 14a.

The district court further directed that, "[f]or those cases that do not settle through mediation, the court desires to conduct mini-trials in groups of eight plaintiffs. That number may be increased to ten after the completion of a few trials. Counsel shall discuss and endeavor to reach agreement on a fair method for selecting plaintiffs for group trials. . . . [T]he plaintiffs who are grouped together in each mini-trial should insofar as possible come from the same work sites and similar crafts in order to expedite the presentation of evidence on exposure." App. 14a.

The district court ordered that the proposed trial plan be structured in a manner that would have scheduled the first mini-trial in May 1999 and the second mini-trial in June 1999. App. 15a. The district court announced that, thereafter, it would "conduct two mini-trials per month in separate courtrooms, provided that the two district judges involved are able to attend to the other demands of their dockets." App. 15a.

6. The MDL Transfer Order.

The district court's efforts to resolve the remaining issues in an orderly fashion were short-circuited by a transfer order issued in Docket No. 875 by the Judicial Panel on Multidistrict Litigation on February 5, 1999, transferring the cases to the Eastern District of Pennsylvania. The order was issued with the support of defendant Pittsburgh Corning, over the petitioners' strenuous objection.

The transfer order was premised on the erroneous assumption that the cases were "in a pretrial status." App. 10a. The Panel on Multidistrict Litigation further maintained that the cases involved "common questions of fact" with actions previously transferred to the Eastern District of Pennsylvania and that transfer would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." App. 9a. The Panel on Multidistrict Litigation also considered factors wholly foreign to Section 1407, including "the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand of actions for trial." App. 10a. The Panel on Multidistrict Litigation brushed off petitioners' objections to transfer with the suggestion that "[t]o parties that believe their situation renders inclusion of their action in MDL-875 unnecessary or inadvisable, we note that whenever the transferee judge deems remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay." App. 10a-11a.

7. The Third Circuit's Decision.

On petition for a writ of mandamus, the Third Circuit upheld the Panel on Multidistrict Litigation's transfer order. The Third Circuit saw no effective limit to the MDL transfer power.

With respect to the absence of common issues, the Third Circuit simply overrode the holdings of the Eastern District of Texas and the Fifth Circuit that the common issues of fact in this case had been resolved by the Phase I findings. The Third Circuit insisted that "[t]here remain many common questions of fact in the *Cimino* cases" and there also "remain many common important matters of law, further justifying transfer." App. 6a. The Third Circuit explained that "[t]he Multidistrict Panel interprets the 'common questions of fact' requirement broadly, and will even transfer cases that involve common important or dispositive questions of law, in addition to the existence of some common questions of fact." App. 5a. The Third Circuit added that "Subsection 1407(a) 'does not require that there be strict identity of issues or a predominance of common questions or that they be central to or determinative of the controversy in order to justify transfer.'" App. 6a (citation omitted).

Next, the Third Circuit held that the convenience of the parties justified transfer. The Third Circuit ignored that the fact that any remaining discovery in the instant cases would entail highly individualized issues, such as exposure and damages, of no relevance to the great mass of cases in MDL-875. The Third Circuit tersely announced that "the broader group will benefit from consolidated treatment." App. 7a.

The Third Circuit also opined that judicial efficiency would be served by the transfer. The Third Circuit did not mention the Eastern District of Texas' announced plan for mediation and mini-trials beginning in May 1999. The Third Circuit simply assumed that Judge Weiner in the Eastern District of Pennsylvania would do a better job.

Petitioners sought rehearing before the Third Circuit, which

was denied. Chief Judge Becker indicated that he would have granted rehearing en banc on the ground that "the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court. He sees the only causation questions remaining as those relating to individual damages determinations." App. 16a-17a n.2.

REASONS FOR GRANTING THE WRIT

The transfer order in this case represents both a clear abuse of discretion and a usurpation of judicial authority. It also thwarts important interests in justice and judicial economy. The common issues of product defect, inadequate warnings, gross negligence, and punitive damages have already been decided in these cases by the Phase I jury verdicts. The Chief Judge of the Eastern District of Texas developed a trial plan that would ensure completion of the trials "as soon as possible," beginning in May 1999. App. 14a. The Third Circuit's decision ran roughshod over the Phase I jury verdicts and the trial plan formulated by the Eastern District of District.

This Court's review is urgently needed for several reasons. First, the decisions by the Judicial Panel on Multidistrict Litigation and by the Third Circuit conflict with numerous decisions in the lower courts on when transfer may be ordered. Indeed, the Third Circuit's decision here cannot be reconciled with its own prior ruling in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997), which underscored the individual nature of causation and damages issues in asbestos litigation, even in the settlement context. As Chief Judge Becker opined, in explaining that he would have granted rehearing en banc, "the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by

the transfer of the *Cimino* cases to the transferee court. . .. [T]he only causation questions remaining a[re] those relating to individual damages determinations." App. 16a-17a n.2.

Second, the Third Circuit's ruling creates an effective conflict with previous decisions in this very case by the Fifth Circuit and the Eastern District of Texas. In effect, the Third Circuit has simply elbowed the federal courts in Texas out of the way and seized these cases for itself and the Eastern District of Pennsylvania.

Third, the Third Circuit permitted the Judicial Panel on Multidistrict Litigation to consider, as a reason for ordering transfer of *these* cases, the possibility of facilitating settlement of *other* cases in MDL-875. This factor was wholly impermissible under the governing statute, 28 U.S.C. § 1407.

There is a central theme uniting all of the various reasons for granting certiorari: the unprincipled expansion of judicial power by the Judicial Panel on Multidistrict Litigation. 28 U.S.C. § 1407(a) authorizes MDL treatment only for cases which have not yet gone to trial — not for half-completed actions like those at issue here. "Congress, in enacting Section 1407, presumably mindful of the deference traditionally accorded to the plaintiff's choice of forum, limited the power of the Multidistrict Panel to the transfer of pre-trial proceedings. . . . [T]ransfer under Section 1407 is solely for purposes of pretrial proceedings . . . ." 15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3862 (2d ed. 1986 and 1998 Supp.) (internal quotation omitted). Indeed, the Panel on Multidistrict Litigation's original decision in Docket No. 875 recognized that "[t]he Panel's authority under § 1407 is to transfer for pretrial proceedings; actions on Schedule A that have been resolved or are presently in trial are not intended to be within the scope of the Panel's transfer decision." *In re Asbestos Prod. Liab. Litig.*, 771 F. Supp. 415, 424 n.11 (J.P.M.L. 1991).

The decisions of the Judicial Panel on Multidistrict Litigation

and of the Third Circuit in this case reflect the same MDL process run riot as that condemned by this Court in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998). There, in the course of disapproving of the wide-ranging use of the multidistrict process in which some lower courts have engaged in recent years, this Court held that a district court conducting such pretrial MDL proceedings may not assign a transferred case to itself for trial. In doing so, this Court noted that the Ninth Circuit found that such transfers were "conducive to efficiency," *id.* at 960; that Rule 14(b) of the Rules of the Judicial Panel on Multidistrict Litigation had endorsed the practice; and that noted commentators and many lower courts had approved it. 118 S. Ct. at 961. Nonetheless, this Court held that the statute limits a transferee court's authority to the conduct of "coordinated or consolidated" proceedings and to those cases that are "pretrial." This Court cited legislative history indicating that § 1407 was not intended to affect the venue of cases already in trial:

> The proposed statute affects only the pretrial stages in multidistrict litigation. It would not affect the place of trial in any case or exclude the possibility of transfer under other Federal statutes.
>
> * * *
>
> The subsection requires that transferred cases be remanded to the originating district at the close of coordinated pretrial proceedings. The bill does not, therefore, include the trial of cases in the consolidated proceedings.

H.R. Rep. No.1130, 90th Cong., 2d Sess., p. 4 (1968).

The Third Circuit's decision in this case abrogated the very same statutory limit.

A. The Third Circuit's Decision Conflicts with

Numerous Other Decisions in the Lower Courts.

The transfer order is this case involves actions already in trial as to which the liability phase had already been completed in an eight-week 1990 trial. The Texas district court observed that, "[a]lthough the Court of Appeals disapproved of the extrapolation procedure which was used by this court, the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier." App. 12a. "[B]ecause the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages [i]n 143 cases. *The phase I or liability part of the trial of all of these cases has been completed.*" App. 13a (emphasis added).

The Phase I findings, which have been affirmed on appeal, establish that Pittsburgh Corning's asbestos-containing products were defective and unreasonably dangerous; that its warnings were inadequate; that the company knew or should have known in 1962 that its products posed a danger of asbestos-related disease; and that it was grossly negligent. A punitive multiplier in the amount of three times actual damages has already been established. In a very real sense, the trials in this case are already half done.

Further, the jury's verdicts conclusively resolve any "common questions of fact" that the cases might share with actions already coordinated or consolidated in Docket No. 875 for pretrial purposes. Any supposed common questions of fact would pertain to questions of liability — product defect, adequacy of warnings, and so on — which have *already been resolved* by the Phase I findings in these cases. Indeed, the Judicial Panel previously recognized, in commencing the asbestos products liability multidistrict proceeding, that "the principal area common to all actions [would be] the state of medical and scientific knowledge at a particular time regarding the health hazards posed

by exposure to asbestos." *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 417 (J.P.M.L. 1991); *see also In re Asbestos & Asbestos Insulation Material Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) ("the only questions of fact common to all actions relate to the state of scientific and medical knowledge at different points in time concerning the risks of exposure to asbestos").

The state-of-the-art and similar issues have already been resolved by the Phase I trial in these cases. The sole remaining questions relate to exposure and, for some plaintiffs, damages. *See Cimino*, 751 F. Supp. at 665 ("*Cimino* was a trial in the traditional sense. The 373 Orders entered and the numerous other rulings were the product of judicial opinion, not calculations. The liability verdicts and 160 damage awards were made by three juries in a traditional trial.").

Thus, it is plain that the "common questions" requirement cannot be met in this proceeding. Any additional discovery that may be needed, such as "updated medical records," App. 14a, or individual exposure data, will not involve any issues in common with asbestos cases consolidated in the Eastern District of Pennsylvania. Any further discovery that may be needed in this proceeding will relate to individualized questions of exposure and damages. Moreover, such discovery should occur in Texas, not in Pennsylvania. It should not be undertaken in coordinated or consolidated pretrial proceedings.

The Third Circuit ignored these considerations. It insisted that, "[a]side from the factual issues, there remain many important matters of law, further justifying transfer." App. 6a. Yet § 1407(a) expressly refers to questions of "fact," not of *law*, and it would obliterate Congress' handiwork to hand the MDL panel a blank check to transfer cases on the basis of *legal* rather than *factual* similarities.

Accordingly, the Third Circuit's judgment in this case conflicts with numerous other decisions in the lower courts.

Indeed, the Third Circuit's judgment conflicts with its own prior decision in *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997), where the Third Circuit rejected a mass settlement in an asbestos case and explained that the common issues in asbestos cases are limited to: the "capacity of asbestos to cause disease" (although that question was resolved implicitly in Phase I of the trial in this proceeding); whether the defendants had knowledge of the hazards of asbestos (resolved conclusively in Phase I of the trial in this proceeding); whether the defendants adequately tested their asbestos products (resolved conclusively in Phase I of the trial in this proceeding); whether the warnings accompanying the defendants' products were adequate (resolved conclusively in Phase I of the trial in this proceeding). *Georgine*, 83 F.3d at 626. Questions of causation and damages raise *individualized* issues rather than *common* issues. Indeed, it is for that very reason that — as the Third Circuit observed in this case — "the use of the class action device to settle asbestos cases has been questioned in several recent Supreme Court opinions." App. 6a n.2.

Pittsburgh Corning itself has stressed that the exposure and causation issues are highly individualized and must be analyzed plaintiff by plaintiff. In its response to Plaintiffs' trial plan filed in the Eastern District of Texas, Pittsburgh Corning argued that "proof of injury" is an "individualized and independent" process. Quoting this Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), Pittsburgh Corning contended that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry." "The plaintiffs' claims for compensatory and punitive damages must therefore focus almost entirely on facts and issues specific to individuals rather than the class as a whole." "[I]ndividual issues

includ[e] proximate causation, comparative negligence, reliance, and compensatory damages." Pittsburgh Corning's Response to Plaintiffs' Proposed Trial Plan at 9, 10 & n.25 (filed Nov. 5, 1998).

Hence, the decisions of the Third Circuit and of the Panel on Multidistrict Litigation fly in the face of numerous rulings in the lower courts. "[I]mplicit in the common question requirement is the notion that it should be more economical or convenient to conduct pretrial proceedings on the common issues in one forum." 15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3863 (2d ed. 1986 and 1998 Supp.). "A transfer under the multidistrict litigation statute is appropriate only if two or more civil actions raise one or more common questions of fact. If the degree of commonality among the actions does not rise to a level such that a transfer would serve the overall convenience of the parties and witnesses and promote the just and efficient conduct of the entire litigation, the transfer will be denied. . . . [T]he party moving for a transfer [is required] to show that any common questions of fact are so complex, and the accompanying discovery so time-consuming, that the advantages of combining the actions for coordinated or consolidated pretrial proceedings overcomes the inconvenience to some of the litigants and their witnesses in the actions whose transfer is being considered." 17 MOORE'S FEDERAL PRACTICE § 112.05 (3d ed. 1997). *See also In re Asbestos School Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985) (denying transfer: "Although we recognize that the actions in this litigation involve some common questions of fact, we are not persuaded that these common questions of fact will predominate over individual questions of fact present in each action."); *In re Deering Milliken Patent Litigation*, 476 F. Supp. 461, 464 (J.P.M.L. 1979) ("Most, if not all, of the common questions of fact between the two actions before us arise from the liability issues in each action. All pretrial proceedings, as well as a trial, on the liability issues in the South Carolina action have long since been completed. . .. Also, interjection of the North Carolina

action into the extremely advanced proceedings in the South Carolina action could delay the completion of those proceedings."); *In re United Gas Pipe Line Co. Litig.*, 391 F. Supp. 774, 776 (J.P.M.L. 1975) (denying transfer where factual issues predominantly unique to each plaintiff's relationship with defendant); *In re Grand Funk Railroad Trademark Litig.*, 371 F. Supp. 1084, 1085 (J.P.M.L. 1974) (denying transfer where "the discovery involving defendants' alleged infringement will focus on localized factual issues"); *In re Air Crash Disaster Near Silver Plume*, 368 F. Supp. 810, 811 (J.P.M.L. 1973) (denying transfer where there were only limited questions of fact in common).

Even a finding that discovery has substantially progressed or that a case is nearing trial is ordinarily sufficient to prevent transfer. "[A] finding that discovery already has progressed quite far in one or more of the actions . . . or that some of the cases proposed for consolidation are proceeding expeditiously and are near trial, . . . or that an important motion is under submission in one of the original courts typically will result in a denial of transfer, at least of those actions that are maturing in their home districts and probably would not benefit from the transfer." 15 WRIGHT, MILLER AND COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3863 (2d ed. 1986 and 1998 Supp.). *See also* 17 MOORE'S FEDERAL PRACTICE § 112.05 (3d ed. 1997) ("when the pretrial proceedings in a case or group of cases are very nearly complete or discovery is well advanced, the Panel will decline to order transfer of that case or group of cases. . . . The denial of a transfer because the pretrial activities in a case have been completed or are nearly completed also applies to tag-along actions that would otherwise be transferred and coordinated with related actions that have previously been transferred."); American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* § 3.01 (1994) (stating that one of the principal concerns in deciding whether or not to transfer a case is "the stages to which the actions already have progressed").

The Third Circuit's judgment conflicts with many other

decisions in the lower courts:

· *In re Dow Chem. Co. "Sarabond" Prods. Liability Litigation*, 650 F. Supp. 187 (J.P.M.L. 1986) (action pending for over three years was at a sufficiently advanced stage to warrant its exclusion from a Section 1407 transfer).

· *In re Asbestos School Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985) (denying transfer and "not[ing] that the common questions of fact involved in these actions have been extensively litigated for the past ten years in connection with thousands of personal injury actions arising from alleged asbestos exposure").

· *In re A.H. Robins Co., Inc. "Dalkon Shield" IUD Prod. Liab. Litig.*, 570 F. Supp. 1480, 1481-1482 (J.P.M.L. 1983) (since reopened common discovery proceedings in actions that had previously been transferred were almost complete, transfer of additional cases would not serve convenience of parties or just and efficient conduct of litigation).

· *In re Rely Tampon Prod. Liab. Litig.*, 533 F. Supp. 1346, 1347 (J.P.M.L. 1982) (denying transfer where "1) discovery in many actions in this docket is well advanced; and 2) pretrial proceedings have been completed and trial is imminent in at least two actions. Under these circumstances, we cannot conclude that centralization of the actions in this litigation under Section 1407 will further the purposes of the statute.").

· *In re A. H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig.*, 505 F. Supp. 221, 223 (J.P.M.L. 1981) ("Although we recognize that these actions share questions of fact with actions previously transferred in this litigation, we are not persuaded that transfer under Section 1407 remains appropriate for newly filed actions in this docket. This litigation has been pending for over five years and discovery of common issues has been completed in the transferee district.").

· *In re Ecuadorian Oil Concession Litigation*, 487 F. Supp. 1364, 1368 (J.P.M.L. 1980) (denying transfer where "[t]he

Delaware action and the Florida action have each been pending for almost three and one half years. All parties represent that extensive document discovery is virtually complete in both actions; and a June 30, 1980 discovery cutoff has been established in the Delaware action. Under these circumstances, centralization of the Florida and Delaware actions could delay the termination of the Delaware action without producing any overriding benefits.").

· *In re Insulin Mfg. Antitrust Litigation*, 487 F. Supp. 1359, 1361 (J.P.M.L. 1980) (denying transfer where "[t]he Illinois action was commenced over two years ago, considerable discovery has occurred in this action, and the Illinois plaintiff maintains that the action is nearly ready for trial. Thus, on the basis of the record before us, inclusion of the Illinois action in centralized pretrial proceedings could delay the termination of that action without producing any overriding benefit to the litigation as a whole.").

· *In re Cable Tie Patent Litigation*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980) (denying transfer where "[t]he two Illinois actions against All States have been pending for over three years, and discovery concerning the common factual questions in this litigation is well advanced").

· *In re Chiropractic Antitrust Litigation*, 483 F. Supp. 811, 813 (J.P.M.L. 1980) (denying transfer where "discovery in the Illinois action is near completion, and inclusion of this action in centralized pretrial proceedings could delay the termination of that action without producing any overriding benefit to the litigation as a whole").

· *In re Midwest Milk Monopolization Litigation*, 483 F. Supp. 823 (J.P.M.L. 1980) (tag-along transfer was refused when the lead transferred case had been in trial for over two years and when the potential tag-a-long case had been pending for over four-and-one-half years).

· *In re Motion Picture Licensing Antitrust Litig.*, 479 F. Supp.

581, 590 (J.P.M.L. 1979) (transfer of actions for consolidation with previously transferred actions was not ordered, since discovery in other pretrial proceedings was well advanced).

· *In re McDonald's Franchise Antitrust Litigation*, 472 F. Supp. 111, 114 (J.P.M.L. 1979) (denying transfer: "All discovery has been concluded in the Virginia action, and trial is imminent in that action. The Florida action has been pending for several years and, on the basis of the record before us, discovery on the real estate tying claim in that action is nearly, or perhaps entirely, completed. Therefore, nothing would be achieved by including those two actions in coordinated or consolidated pretrial proceedings.").

· *In re Women's Clothing Antitrust Litigation*, 455 F. Supp. 1388, 1390 (J.P.M.L. 1978) ("While we agree that these actions involve significant common questions of fact[,] . . . on balance we are persuaded that this factor is outweighed by the advanced stage of pretrial proceedings in these actions . . . .").

· *In re Ortho Pharmaceutical "Lippes Loop" Prods. Liability Litigation*, 447 F. Supp. 1073 (J.P.M.L. 1978) (when trial was "imminent" in one action and discovery cut-off and trial dates had been set in another, both actions were excluded from transfer).

· *In re Raymond Lee Organization, Inc., Secs. Litigation*, 446 F. Supp. 1266 (J.P.M.L. 1978) (discovery completed in one of two actions, thus diminishing benefits to be gained from transfer).

· *In re Allen Compound Bow Patent Litigation*, 446 F. Supp. 248, 250 (J.P.M.L. 1978) (denying transfer: "The California action has been pending for approximately two years, is well advanced, as movants acknowledge, on discovery concerning the common factual questions in this litigation, is set for a final pretrial conference on April 7, 1978, and is thus nearly ready for trial.").

· *In re Helicopter Crash Near Cameron, Louisiana, on April 23, 1976*, 443 F. Supp. 1022, 1023 (J.P.M.L. 1978) (denying transfer where trial court had set a final pretrial conference and

trial date).

· *In re Midwest Milk Monopolization Litigation*, 441 F. Supp. 930 (J.P.M.L. 1977) (denial of transfer of tagalong case that had proceeded in original district for more than three and one-half years and in which trial was imminent).

· *In re Southern Ry. Employment Practices Litigation*, 441 F. Supp. 926, 927 (J.P.M.L. 1977) (denying transfer where "[t]he Ohio action has been pending for over three years and considerable pretrial proceedings have occurred in that action.").

· *In re Westinghouse Elec. Corp. Employment Discrimination Litigation*, 438 F. Supp. 937, 939 (J.P.M.L. 1977) (denying transfer where "discovery and other pretrial proceedings in EEOC are nearly complete, that . . . action is near trial, and . . . therefore the action should not be included in coordinated or consolidated pretrial proceedings").

· *In re Luminex Int'l Prods. Liab. Litig.*, 434 F. Supp. 668, 669-670 (J.P.M.L. 1977) (transfer denied on ground that, though actions might share some common questions of fact, transfer to California would not necessarily serve convenience of parties and witnesses, or promote just and efficient conduct of actions, because pretrial proceedings in Louisiana action were well advanced).

· *In re Asbestos & Asbestos Insulation Material Prods. Liability Litigation*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) (denying transfer where "many of these actions already are well advanced. Some of the actions have been pending for up to four years, and trial dates or discovery cutoff dates have been set in several actions. Under these circumstances, transfer would not further the purposes of Section 1407.").

· *In re Four Seasons Sec. Laws Litig.*, 362 F. Supp. 574, 575 (J.P.M.L. 1973) (denial of transfer because of completion or near-completion of pretrial activities applies to tag-along actions).

B. The Third Circuit Created a Direct Jurisdictional Conflict With the Eastern District of Texas

Prior to the transfer order, the Eastern District of Texas, proceeding on the assumption that "these cases [would] remain in this district for completion of the trials," App. 14a, had already outlined its plan for expeditiously resolving the remaining issues through mini-trials on exposure and damages, beginning in May 1999. The district court made arrangements for any additional discovery that was needed. "Discovery shall occur on a rolling basis and be focused on each group of plaintiffs as the dates for mini-trials approach." App. 14a. The district court also put in place procedures to encourage settlement, instructing that, "[a]t the conclusion of discovery for each mini-trial group of plaintiffs, those cases shall be referred to a qualified attorney mediator for mediation. Counsel are encouraged to agree upon the name of an attorney mediator. If counsel are unable to agree, the court will designate a mediator." App. 14a.

The transfer order in effect pulled the rug out from underneath the Eastern District of Texas. The transfer here will negate the Texas district court's efforts to resolve these cases promptly through mini-trials beginning in May 1999. The Third Circuit justified this internecine conflict by opining that "no judgments had been entered in the remaining 2,123 extrapolation cases." App. 6a n.2. But the Third Circuit's assertion was directly contrary to the Eastern District of Texas' holding that "the [Fifth Circuit] did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier," App. 12a, and that "the phase I class-wide findings were not disturbed by the Court of Appeals' decision." App. 13a. According to the Texas court, "[t]he phase I or liability part of the trial of all of these cases has been completed." App. 13a; according to the Third Circuit, the cases were in a "pretrial" posture. App. 3a.

In short, the Third Circuit was able to sustain its holding only by directly repudiating the prior decision of the Eastern District

of Texas. No constructive purpose will be served by transferring the cases to the Eastern District of Pennsylvania. The convenience of the parties will be not served: the evidence and witnesses relating to the remaining individualized exposure and damages issues are located in Texas, not in Pennsylvania.

Nor will justice or judicial economy be served. The transfer here was proposed by the defendant only as a delaying tactic, in response to the pressure brought by the Eastern District of Texas to resolve the cases in a quick and expeditious manner. The result of transfer will be to further prolong these cases, whose longevity is already an embarrassment to the judicial system. Approximately one-third of the plaintiffs have died since this case was tried in 1990. The transfer order will deny justice to even more of the sick and elderly plaintiffs who have already been made to suffer enough.

C. The Third Circuit Approved the Use of Impermissible Factors as Reasons for Transfer

The Judicial Panel on Multidistrict Litigation cited as factors relating to § 1407 transfer "the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand actions for trial." App. 10a. These speculative concerns were wholly impermissible factors for the panel's consideration. The MDL statute contemplates that MDL proceedings will be used "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). The MDL statute does not authorize the MDL panel or the MDL transferor court to interfere with cases where the common issues have already been resolved, in order to preserve the defendants' assets or to promote settlements in other cases. The MDL statute is not a limited-fund class action provision, or a substitute for bankruptcy, or a cramdown provision designed to preserve the defendants' assets. Section 1407 provides for the coordination of pretrial proceedings, not for the coordination of

settlement strategies.

This Court has already made clear that procedural rules are not to be bent simply to promote settlements — in asbestos or other cases. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (construing Fed. R. Civ. P. 23). As the Third Circuit itself opined, in a decision that was affirmed by this Court, "there is no language in the rule that can be read to authorize separate, liberalized criteria for settlement classes." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996). The Panel on Multidistrict Litigation's consideration of the impact of transfer on the prospects for settlement in separate cases currently pending in Docket 875 was completely improper and by itself warrants review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

Of Counsel:

WAYNE A. REAUD
JOHN WERNER
REAUD, MORGAN & QUINN, INC.
801 Laurel
Beaumont, Texas 77701
(409) 838-1000

JONATHAN S. MASSEY
3920 Northampton St. N.W.
Washington, D.C. 20015
(202) 686-0457

GREG M. THOMPSON
Counsel of Record
JOHN A. COWAN
PROVOST & UMPHREY
LAW FIRM, L.L.P.
490 Park Street
Beaumont, Texas 77701
(409) 835-6000
(409) 838-8883 (fax)

Counsel for Petitioners

APPENDIX TABLE OF CONTENTS

APPENDIX A

Opinion of the Court of Appeals 1a

APPENDIX B

Transfer Order of the Judicial Panel on Multidistrict Litigation 9a

APPENDIX C

Case Management Order of the Eastern District Court of Texas 12a

APPENDIX D

Order Denying Petition for Rehearing 16a

Appendix A

Unreported — Not Precedential

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1217

IN RE CLAUDE CIMINO, et al.

Petitioners,

On Petition from the United States District Court for the Eastern District of Pennsylvania and the Order of the Judicial Panel on Multidistrict Litigation (Asbestos Personal Injury MDL-875)

Argued June 22, 1999
Before: NYGAARD, WEIS, and STAPLETON, *Circuit Judges*
Filed July 26, 1999

OPINION OF THE COURT

WEIS, *Circuit Judge.*

Petitioners are a group of asbestos plaintiffs whose "tag-along" cases originally filed in the United States District Court for the Eastern District of Texas have been transferred to the Eastern District of Pennsylvania by the Judicial Panel on Multidistrict Litigation. Requesting that their cases be returned to the Texas court, petitioners request a writ of mandamus. We will deny the petition.

I.

In 1991, the Judicial Panel on Multidistrict Litigation ("Multidistrict Panel") ordered the bulk of federal asbestos cases transferred to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1407. *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). Because they were in a post-trial phase at that time, the *Cimino* cases were not involved in the initial transfer.

Some 3000 of the *Cimino* cases had been consolidated and a class certified by the trial court. The case had been submitted to multiple juries in 1990 under a three-phase plan. In Phase I, there was a complete trial for ten class representatives, and findings were made with respect to product defectiveness, warning, and punitive damages, including a multiplier as to each defendant. Phase II — which was supplanted by a stipulation — would have addressed exposure on a craft and job-site basis. In Phase III, 160 "sample" cases from five different disease categories were tried to determine individual damages.

After the juries announced their findings, the trial judge held that the damages in the various disease categories from Phase III were representative of the losses in the remaining 2,128 cases. He therefore calculated damages in five "extrapolation" cases based on the average damages in the corresponding disease categories. Punitive damages for each case would be based on the Phase I determination. Accordingly, judgment was entered against defendant Pittsburgh Corning in 157 cases (nine class representative cases; 143 sample cases; and five extrapolation cases).

The Court of Appeals for the Fifth Circuit, rejecting some aspects of the trial plan, reversed the judgments entered in the Phase III sample cases and the five extrapolation cases, and remanded for further proceedings. *Cimino v. Raymark Ind., Inc.*, 151 F.3d 297, 335 (5th Cir. 1998). The judgments in the nine class representatives' cases were remanded only for recalculation

of prejudgment interest. *Id.* According to the appellate Court, no judgments were entered in the remaining 2,123 extrapolation cases. *Id.* at 300 n.6.

Shortly afterwards, the Multidistrict Panel began transfer proceedings. The trial court, anticipating that transfer might not occur, entered an order providing for mini-trials of groups of eight plaintiffs on causation and damages in the 2,128 former extrapolation cases as well as trials on causation and possibly retrials on damages in the 143 sample cases. It therefore ordered the parties to arrange for additional discovery, including updated medical records, expert reports, and the circumstances of exposure. The court also read the Court of Appeals' opinion as approving application of the Phase I findings on product defectiveness, warning, and punitive damages to the entire class.

On Feb. 5, 1999, the Multidistrict Panel transferred these cases — 2,280 in total[1] — pursuant to MDL-875. It found that they involved common questions of fact with those previously transferred, and that the convenience of the parties and witnesses as well as the just and efficient conduct of the litigation would be served by the transfer. Commenting that these cases had been in a post-trial phase at the time of the initial MDL-875 transfer, the Multidistrict Panel held that they were now in a "pretrial status" by virtue of the Court of Appeals' rulings and could be transferred for the reasons stated in *In re Asbestos Prods. Liab. Litig. (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991).

The Multidistrict Panel also noted the success of the transferee judge in closing nearly 60,000 cases. It suggested that disputed issues — such as pretrial discovery, the need for other pretrial proceedings, settlement and funding issues — could be addressed by the transferee court, which would be in the best position to "conduct a substantive review of such elements and

---

[1] This figure appears to correspond to the2,128 extrapolation cases, the 143 Phase III sample cases, and the nine class representatives.

their impact on the whole proceedings." The Multidistrict Panel pointed out that remand of claims or actions was available when deemed appropriate by the transferee judge. This petition followed.

II.

We have the authority to consider and grant a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and 28 U.S.C. § 1407(e), which states that the only review of an order of transfer is by extraordinary writ filed with the Court of Appeals having jurisdiction over the transferee court.

Petitioners seek a writ of mandamus to (1) order the Multidistrict Panel to vacate its order of transfer; and (2) order the Eastern District of Pennsylvania to transfer the cases back to the Eastern District of Texas. As a preliminary matter, we note that recent case law makes it clear that only the Multidistrict Panel, and not the transferee court, has the power to transfer cases back to the original trial court. *In re Roberts*, __ F.3d __, No. 98-1593, 1999 WL 330198, at *1 (3d Cir. May 20, 1999); *see also Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40-41 & n.4 (1998). Accordingly, we will construe the petition as a request to order the Multidistrict Panel to remand the *Cimino* cases to the trial court.

A writ of mandamus is an "extraordinary" remedy that is traditionally used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Mallard v. United States District Court*, 490 U.S. 296, 308 (1989) (internal quotation marks omitted); *see also* Fed. R. App. P. 21. A litigant seeking a writ of mandamus must show exceptional circumstances that amount to a usurpation of judicial power, or a clear abuse of discretion. *Mallard*, 490 U.S. at 309.

The petitioner must have "no other adequate means to attain" the desired relief, and has the burden of showing a "clear and indisputable" right to the writ. *Kerr v. United States District*

Court, 426 U.S. 394, 403 (1976) (internal quotation marks omitted). Even where both prerequisites are met, however, issuance of the writ remains largely discretionary. *Id.*

Here, petitioners can show neither an abuse of discretion in the order of transfer, nor a clear and indisputable right of remand. Civil actions involving "one or more common questions of fact" that are pending before multiple districts may be transferred to any district "for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Transfer must be "for the convenience of parties and witnesses and [] promote the just and efficient conduct of such actions." *Id.* The purpose of the statute is to conserve judicial resources by avoiding the waste of duplicative pre-trial proceedings. 17 James W. Moore, et al., MOORE'S FEDERAL PRACTICE § 112.04[1][b], at 112-38 (3d ed. 1999).

The Multidistrict Panel interprets the "common questions of fact" requirement broadly, and will even transfer cases that involve common important or dispositive questions of law, in addition to the existence of some common questions of fact. *See In re Mutual Fund Sales Antitrust Litig.*, 361 F. Supp. 638, 640 (J.P.M.L. 1973). The "convenience of parties and witnesses" requirement is viewed from the group perspective. *In re Multidistrict Civil Antitrust Actions Involving Antibiotic Drugs*, 299 F. Supp. 1403, 1405 (J.P.M.L. 1969).

The most important requirement is that transfer promote the just and efficient conduct of the actions. 17 Moore, *supra*, § 112.04[1][d], at 112-44; *see also In re Ivy*, 901 F.2d 7, 9 (2d Cir. 1990). Thus, there need not be a predominance of common questions of fact if the Multidistrict Panel believes that transfer is otherwise appropriate to achieve the just and efficient conduct of the actions. *Antibiotic Drugs*, 299 F. Supp. at 1406.

There remain many common questions of fact in the *Cimino* cases.[2] For the 143 sample cases, issues of causation clearly remain, and for the 2,128 extrapolation plaintiffs, additional questions with respect to damages have not been resolved.[3] Even if one assumes that some "common" issues are now settled, there are others still open. Subsection 1407(a) "does not require that there be strict identity of issues or a predominance of common questions or that they be central to or determinative of the controversy in order to justify transfer." 15 Charles Alan Wright, et al., FEDERAL PRACTICE AND PROCEDURE § 3863, at 523 (1986). Thus, there are factual commonalities among these cases, which are similar to those asbestos cases already transferred.

Aside from the factual issues, there remain many common important matters of law, further justifying transfer. *See Mutual Fund Sales Antitrust Litig.*, 361 F. Supp. at 640; 17 Moore, *supra*, § 112.04[1][b], at 112-40.

Counsel cites the second statutory requirement — convenience of the parties and witnesses — and argues that most of them are in Texas and therefore, that transfer is not to their

---

[2] The parties vigorously dispute whether the trial court's determinations on liability, warning, and punitive damages are binding on the entire class as the "law of the case." Despite petitioners' assertions to the contrary, the *Cimino* appellate court stated that no judgments had been entered in the remaining 2,123 extrapolation cases. *Cimino*, 151 F.3d at 300 n.6. Because we conclude that transfer was otherwise appropriate, we need not resolve this dispute. However, we would note that the use of the class action device to settle asbestos cases has been questioned in several recent Supreme Court opinions. *See Ortiz v. Fibreboard Corp.*, ___ U.S. ___, No. 97-1704, 1999 WL 412604 (June 23, 1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).

[3] We are uncertain as to the status of the nine class representatives because the papers filed in this Court do not detail their exact situation. It may be that the only matter remaining as to these plaintiffs is recalculation of prejudgment interest. If so, they retain the ability to seek remand. *See* Rules of J.P.M.L. 7.6. That these petitioners may do so further requires that we deny the extraordinary writ. *See Kerr*, 426 U.S. at 403 (the petitioner should have "no other adequate means to attain" the desired relief).

benefit. However, the Multidistrict Panel looks to the group as a whole, and not to individuals. *Antibiotic Drugs*, 299 F. Supp. at 1405. Similar objections were addressed during the initial transfers under MDL-875. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. at 421-23 (cataloguing devices that the transferee court could use to protect individual interests). Now, as then, the broader group will benefit from consolidated treatment.

Finally, the most important element — judicial efficiency — will be amply served by the transfer. In this case, the trial judge said: "If the Court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing." *Cimino v. Raymark Ind., Inc.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990), *rev'd in part*, 151 F.3d 297 (5th Cir. 1998).

In contrast, Judge Weiner (the transferee judge in the Eastern District of Pennsylvania) has had great success in handling the tsunami of asbestos cases sent his way. Almost 27,000 cases were initially consolidated in 1991. Since then, including the addition of tag-along cases, he has disposed of nearly 60,000. Also, nearly 1,000 actions or claims have been returned to their original transferor districts. Judge Weiner has proven himself an able manager of litigation that the judiciary at every level has described as vexing. *See Ortiz*, 1999 WL 412604, at *5 (referring to the "elephantine mass of asbestos cases"). The "just and efficient conduct" of these actions will therefore be well served by the transfer to his watch.

III.

Because this litigation is once again in a pretrial status, the Multidistrict Panel acted properly in transferring these actions. In doing so, it neither usurped the judicial authority, nor committed a clear abuse of discretion.[4]

---

[4] To the extent that any particular case might merit remand, the proper course for such a litigant is to ask for a suggestion of remand from Judge Weiner, or to seek remand directly from the Multidistrict Panel. *See* 28 U.S.C. § 1407(a);

Accordingly, the petition for a writ of mandamus will be denied.

TO THE CLERK:

Please file the foregoing Opinion.

/s/
United States Circuit Judge

July 26, 1999

Rules of J.P.M.L. 7.6. That petitioners have failed to do so further cuts against their request for the extraordinary writ. *See Kerr*, 426 U.S. at 403 (the petitioner should have "no other adequate means to attain" the desired relief).

Appendix B

Docket No. 875

Before the Judicial Panel on Multidistrict Litigation

In re Asbestos Products Liability Litigation (No. VI)

Before John F. Nangle, Chairman, William B. Enright, Charles A. Brimmer, John F. Grady, Barefoot Sanders,* Louis C. Bechtle and John F. Keenan, Judges of the Panel.

Transfer Order

Before the Panel are motions brought, pursuant to Rule 7.4, R.P.J.P.M.L., 181 F.R.D. 1, 10 (1998), by plaintiffs in the 2,280 Eastern District of Texas actions listed on the attached Schedule A. Movants request that the panel vacate the portions of its orders conditionally transferring their respective action to the Eastern District of Pennsylvania for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket before Judge Charles R. Weiner. Common defendant Pittsburgh Corning Corp. supports transfer.

On the basis of the papers filed and the hearing held, the Panel finds that these actions involve common questions of fact with actions in this litigation previously transferred to the Eastern District of Pennsylvania, and that transfer of the actions to the Eastern District of Pennsylvania for inclusion in the coordinated or consolidated pretrial proceedings in that district will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. We find that transfer of these actions is appropriate for reasons expressed by the Panel in its

---

* Judge Sanders took no part in the decision of this matter.

original decision in this docket directing centralization of all pending federal court actions not then in trial involving allegations of personal injury or wrongful death caused by asbestos or asbestos-containing products. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). These Texas actions, which were in a post-trial appellate phase at the time of the Panel's initial MDL-875 order, are again in a pretrial status as a result of a recent appellate decision and thus fall within the parameters for transfer established by the Panel in this docket. We note that in the Panel's original decision distinctions based on such matters as the docket condition of any specific federal district and the stage of pretrial pretrial proceedings were considered and rejected by the Panel as grounds for carving out exceptions to transfer in this extraordinary docket.

We are not persuaded to depart from this approach in dealing with the question of transfer of these actions now before the Panel. We note that under Judge Weiner's stewardship, as of February 3, 1999, i) nearly 60,000 actions have been closed in the transferee district, and ii) nearly 1,000 actions or claims therein have been returned to their originating transferor districts. Because many of the factors relating to the question of 1407 transfer of these actions (e.g., the status of pretrial discovery, the need for other pretrial proceedings apart from discovery, and the impact that scheduling of trials in the Texas forum would have on MDL-875 settlement efforts, MDL-875 settlement funding and the timing of remand of actions for trial) are either disputed by the parties or affect the overall management of the litigation, we prefer to give the transferee court the opportunity to conduct a substantive review of such elements and their impact on the whole proceedings. To parties that believe their situation renders inclusion of their action in MDL-875 unnecessary or inadvisable, we note that whenever the transferee judge deems remand of any claims or actions appropriate, procedures are available whereby this may be accomplished with a minimum of delay. *See* Rule

7.6, R.P.J.P.M.L., *supra*, 181 F.R.D. at 11-13. We are confident that Judge Weiner will continue to promptly review arguments for returning transferred actions or claims to their transferor courts and will take all appropriate steps to assure their speedy return whenever he is convinced that retention in the MDL-875 proceedings is no longer needed.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, the actions listed on the attached Schedule A be, and the same hereby are, transferred to the Eastern District of Pennsylvania and, with the consent of that court, assigned to the Honorable Charles R. Weiner for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

For the Panel:

/s/
John P. Nangle
Chairman

Feb. 5, 1999

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CLAUDE CIMINO, ET AL.	)	
	)	
V.	)	Case No. 1: 86 CV 456
	)	
RAYMARK INDUSTRIES, INC., ET AL.	)	

INITIAL CASE MANAGEMENT ORDER

On August 17, 1998, the United States Court of Appeals for the Fifth Circuit reversed and remanded to this court the judgments entered in 143 phase III sample cases and five of the "extrapolation cases." *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998). The judgments in the nine class representatives' cases were remanded for recalculation of prejudgment interest. As a result of the decision of the Court of Appeals in rejecting some aspects of this court's trial plan in *Cimino*, there remain pending for disposition the 143 phase III sample cases and around 2,128 so-called "extrapolation cases."

Although the Court of Appeals disapproved of the extrapolation procedure which was used by this court, the opinion by the Appeals Court did approve of the phase I class-wide determination of issues of product defectiveness, warning, and a punitive damages multiplier. Referring to its earlier opinion in *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990), the Court of Appeals stated that "[i]n Fibreboard, we found no impediment to the trial of Phase I." *Cimino*, 151 F.3d at 317. Likewise, in footnote 8 of its opinion, the Court of Appeals reiterated its decision in *Jenkins v. Raymark Industries*, 782 F.2d 468 (5th Cir. 1986) wherein it approved a similar asbestos class action

providing for "class-wide trial of essentially the same phase I common issues, but to be followed by consolidated mini-trials of four to ten plaintiffs on the issues of exposure . . . damages . . . and any comparative fault of each plaintiff . . . ." *Cimino*, 151 F.3d at 301 fn 8. Also, Pittsburgh Corning's appeal of the punitive damages multiplier as established by the phase I jury was rejected by the Court of Appeals. *Cimino*, 151 F.3d at 323-324.

With respect to the phase III sample cases, the Court of Appeals held that ". . . the trial plan was adequately individualized and preserved Seventh Amendment rights with respect to each individual's actual damages from an asbestos-related disease." *Cimino*, 151 F.3d at 314-15. What was lacking in phase III, according to the Appeals Court, was a determination of whether exposure to a Pittsburgh Corning product caused the disease.

In their most recent post-appeal written submission to this court on a proposed trial plan, the plaintiffs contend that the language quoted above as well as other language in the Appeal Court's opinion indicates that the 143 phase III damages verdicts stand intact. However, as pointed out by Pittsburgh Corning in its November 24 response, the plaintiffs asserted in their initial memorandum and proposed trial management plan that the phase III damages determination "fell along with the trial plan." Therefore, the question of whether the damages verdicts in those phase III cases were preserved following the appeal will have to be resolved. The position taken by the plaintiffs on this issue is somewhat unclear to the court at this point.

Nevertheless, because the phase I class-wide findings were not disturbed by the Court of Appeals' decision, what remains for this court are shortened mini-trials on causation and damages in 2,218 cases and on causation and perhaps damages in 143 cases. The phase I or liability part of the trial of all of these cases has been completed.

Pittsburgh Corning has suggested to the Judicial Panel on Multidistrict Litigation that these cases should be consolidated

with MDL 875 as tag-along cases. The Panel will now have to make a decision on whether it is appropriate to transfer these cases, in which issues of product defect, warning and punitive damages have already been tried, to the transferee court in MDL 875. However, assuming these cases remain in this district for completion of the trials, this court is prepared to begin the process the trying these cases in groups using the procedures approved in *Jenkins v. Raymark Industries, supra,* as soon as possible.

In order to facilitate the development of a trial management plan, counsel for all parties are hereby ORDERED to meet in person and confer in a good faith effort to agree on a trial plan which shall be incorporated into a more detailed case management order. The trial plan should include any additional discovery that may be warranted, such as updated medical records and expert reports and discovery into the circumstances of exposure. Discovery shall occur on a rolling basis and be focused on each group of plaintiffs as the dates for mini-trials approach.

At the conclusion of discovery for each mini-trial group of plaintiffs, those cases shall be referred to a qualified attorney mediator for mediation. Counsel are encouraged to agree upon the name of an attorney mediator. If counsel are unable to agree, the court will designate a mediator.

For those cases that do not settle through mediation, the court desires to conduct mini-trials in groups of eight plaintiffs. That number may be increased to ten after the completion of a few trials. Counsel shall discuss and endeavor to reach agreement on a fair method for selecting plaintiffs for group trials. Both sides have suggested in their written submissions, and the court agrees, that the plaintiffs who are grouped together in each mini-trial should insofar as possible come from the same work sites and similar crafts in order to expedite the presentation of evidence on exposure.

Counsel shall structure the proposed trial plan in a manner that will schedule the first mini-trial in May of 1999. The second mini-trial shall occur in June of 1999. Thereafter, the court will conduct two mini-trials per month in separate courtrooms, provided that the two district judges involved are able to attend to the other demands of their dockets. Both sides are encouraged to consent to trials by magistrate judges. In addition, the court foresees extensive participation of magistrate judges in pretrial hearings on issues such as evidentiary matters.

Although it is premature to make a final decision at this time on trial time limits, in light of the large number of cases and the need to efficiently process mini-trials, the court anticipates imposing reasonable time limits on both sides. Each side will be given an equal amount of time which will be determined after the submission of witness lists and estimates on the expected duration of direct and cross exam and the necessity for each listed witness.

Counsel for all parties shall meet and confer at a mutually acceptable time and place, but not later than December 31, 1998. A proposed case management order containing the agreed trial plan shall be submitted to the court on or before January 15, 1999. Counsel shall designate those matters on which they are unable to reach agreement.

SO ORDERED.

Signed this the 2nd day of December, 1998.

/s/
Richard A. Schell,
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1217

IN RE CLAUDE CIMINO, et al.

Petitioners,

On Petition from the United States District Court for the Eastern District of Pennsylvania and the Order of the Judicial Panel on Multidistrict Litigation (Asbestos Personal Injury MDL-875)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge.*
SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, AND WEIS.[1]

The petition for rehearing filed by the Appellant in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court in banc, the petition for rehearing is hereby DENIED.

Chief Judge Becker would have granted rehearing.[2]

---

[1] Vote limited to panel rehearing only.

[2] Chief Judge Becker would have granted rehearing en banc. He believes that

By the Court,

/s/
United States Circuit Judge

DATED: Sept. 9, 1999

---

the Judicial Panel on Multidistrict Litigation abused its discretion in determining that there were common questions of fact whose resolution would be served by the transfer of the *Cimino* cases to the transferee court. He sees the only causation questions remaining as those relating to individual damages determinations.